

LATHAM & WATKINS LLP
Steven M. Bauer (Bar No. 135067)
steven.bauer@lw.com
Margaret A. Tough (Bar No. 218056)
margaret.tough@lw.com
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: +1.415.391.0600
Facsimile: +1.415.395.8095

LATHAM & WATKINS LLP
J. Scott Ballenger (*pro hac vice*)
scott.ballenger@lw.com
555 11th Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: +1.202.637.2200
Facsimile: +1.202.637.2201

CLARENCE DYER & COHEN LLP
Kate Dyer (Bar No. 171891)
kdyer@clarencedyer.com
899 Ellis Street
San Francisco, California 94109-7807
Telephone: +1.415.749.1800
Facsimile: +1.415.749.1694

Attorneys for Defendant
PACIFIC GAS AND ELECTRIC COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA

v.

PACIFIC GAS AND ELECTRIC
COMPANY,

Defendant.

CASE NO. CR-14-00175-TEH

**DEFENDANT'S BRIEF REGARDING
ADDITIONAL MOTIONS IN LIMINE**

Judge: Hon. Thelton Henderson

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. DISCUSSION	1
1. Motion to Preclude Legal Argument in Opening Statement	1
2. Motion to Exclude All Evidence and Argument Relating to CPUC Audits After the San Bruno Accident	2
3. Motion to Exclude All Evidence and Argument Suggesting that an Operator Has Legal Duties Exceeding the Terms of the Regulations	2
4. Motion to Exclude Argument Implying That PHMSA’s Frequently Asked Questions (“FAQs”) Establish a Legal Duty	2
5. Motion to Exclude All Evidence and Argument Relating to Any Other Litigation Involving the Company or Its Employees.....	3
6. Motion to Exclude All Evidence and Argument of Finances Not Tailored to Address “Gross Gains” Caused by the Specific Charged Offenses	3
7. Motion to Exclude Expert Testimony by Alan Beshore	3
8. Motion to Exclude Expert Testimony by Glen Stevick	4
9. Motion to Exclude Expert Testimony by Howard Lubow.....	4
10. Motion to Exclude Testimony by Margaret Felts	5
11. Motion to Exclude All Evidence and Argument Relating to Allegations About Lines Not Alleged in the Indictment or Segments Not Included in the Bill of Particulars.....	5
12. Motion to Exclude All Evidence and Argument Alleging That a Pressure Reading Less Than the Maximum Operating Pressure of a Covered Segment in the Relevant Five Years Is a Violation.....	6
13. Motion to Exclude All Evidence and Argument Relating to the Rule 404(b) Topics Withdrawn by the Government.....	6
14. Motion to Exclude All Evidence and Argument Relating to Distribution Lines	7
15. Motion to Exclude All Evidence and Argument Regarding Data Not Required to be Gathered and Integrated for the Charged Covered Segments	7
16. Motion to Exclude All Evidence and Argument Relating to PG&E’s Gas Pipeline Replacement Program	8

1	17.	Motion to Require a Proffer of Scienter Evidence.....	8
2	18.	Motion to Exclude All Evidence and Argument Relating to the	
3		Government’s Untimely 23rd Rule 404(b) Topic.....	9
4	III.	CONCLUSION	9
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Burkhart v. Washington Metropolitan Area Transit Authority</i> , 112 F.3d 1207 (D.C. Cir. 1997)	1
<i>Hangarter v. Provident Life and Accident Insurance Co.</i> , 373 F.3d 998 (9th Cir. 2004)	1
<i>Kinan v. City of Brockton</i> , 876 F.2d 1029 (1st Cir. 1989)	3
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	8
<i>United States v. Sanford Ltd.</i> , 878 F. Supp. 2d 137 (D.D.C. 2012)	3
<i>United States v. Vega</i> , 188 F.3d 1150 (9th Cir. 1999)	9
<i>United States v. Yoon</i> , 2014 WL 5023100 (C.D. Cal. Oct. 8, 2014)	2

RULES

Fed. R. Evid. 401	9
Fed. R. Evid. 402	9
Fed. R. Evid. 403	9
Fed. R. Evid. 404(b)	6, 7, 9

REGULATIONS

49 C.F.R. § 192.917(b)	7
------------------------------	---

I. INTRODUCTION

The Court’s January 7, 2016 Order stated that each party shall file no more than ten motions *in limine* on January 11, and if “either party believes that additional motions *in limine* must eventually be decided, it may file . . . a brief of not more than 10 pages that lists and summarizes all such proposed motions.” Dkt. 232 at 3. PG&E respectfully requests that it be permitted to file the additional motions *in limine* described below.

II. DISCUSSION

Based on the information currently available to it, PG&E believes that the following motions are necessary to address important evidentiary issues before trial. In a December 22, 2015 letter, we asked the government whether it would commit not to introduce most of this evidence. The government responded that, unless we hear otherwise, we can assume that it would oppose PG&E’s motions.¹

1. Motion to Preclude Legal Argument in Opening Statement

In paragraphs 6 through 21 of the superseding indictment (“SI”), the government asserts its interpretations and opinions about the governing laws and regulations. Dkt. 22 ¶¶ 6-21. This extended discussion raises the specter that the government will similarly seek to argue its legal conclusions during its opening statement. It is the province of the Court—not the prosecution—to instruct the jury on the applicable law. *See Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) (“Each courtroom is equipped with an expert, called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.”). Unless the government clarifies before opening statements that it does not intend to make these portions of the superseding indictment a part of that presentation, a motion will be necessary.

¹ This list does not include any possible motions *in limine* related to evidence the government produces after January 11, 2016, which the Court has already ordered may be filed at a date to be determined. Dkt. 213 at 1.

2. Motion to Exclude All Evidence and Argument Relating to CPUC Audits After the San Bruno Accident

We anticipate that the government intends to introduce evidence relating to CPUC audits and findings. Evidence of CPUC reports from its audits of PG&E's integrity management program conducted after the San Bruno accident is irrelevant to the charged conduct and is inadmissible hearsay.

3. Motion to Exclude All Evidence and Argument Suggesting That an Operator Has Legal Duties Exceeding the Terms of the Regulations

The government's expert disclosures and superseding indictment suggest that it intends to offer evidence that PG&E failed to comply with certain standards of care that are neither codified in the charged regulations nor have the force of law. For example, the disclosures indicate that the government plans to present testimony about "the industry's standard of care," corporate safety culture standards, and "industry practice." This might have a place in a negligence trial, but it is irrelevant to the criminal violations charged here. The testimony will confuse and mislead the jury. *See United States v. Yoon*, No. CR 11-00922(B) DDP (9), 2014 WL 5023100, at *2 (C.D. Cal. Oct. 8, 2014) ("[I]ntroducing civil or regulatory standards has the strong potential to confuse [] the jury Because the danger of such confusion substantially outweighs the probative value of a description of such standards, testimony as to such standards is excluded.").

4. Motion to Exclude Argument Implying That PHMSA's Frequently Asked Questions ("FAQs") Establish a Legal Duty

The superseding indictment suggests that the government intends to argue that PG&E "violat[ed]" and "contraven[ed]" PHMSA FAQs, *see* SI (Dkt. 22) ¶¶ 38, 60, even though the FAQs state on their face that they "are not substantive rules and do not create rights, assign duties, or impose new obligations not outlined in the existing integrity management regulations and standards," PHMSA, *Gas Transmission Integrity Management: FAQs*, <https://primis.phmsa.dot.gov/gasimp/faqs.htm>. It is the Court's role to instruct the jury regarding

1 the law, and misleading statements regarding the FAQs could usurp that role and mislead the
2 jury.

3 5. Motion to Exclude All Evidence and Argument Relating to Any Other Litigation
4 Involving the Company or Its Employees

5 The government may attempt to introduce evidence of past or pending litigation
6 involving PG&E. PG&E, like many companies, has faced lawsuits during its years in operation.
7 None of this other litigation is probative of whether PG&E committed the charged offenses. Any
8 other legal matters are too dissimilar to be relevant and would only be used to portray PG&E as a
9 “bad” company that should be found guilty here. As one court warned, introducing such
10 evidence “would inevitably result in trying those cases, or at least portions of them, before the
11 jury. . . . The result would be confusion and the consumption of a great deal of unnecessary
12 time.” *Kinan v. City of Brockton*, 876 F.2d 1029, 1034 (1st Cir. 1989).

13 6. Motion to Exclude All Evidence and Argument of Finances Not Tailored to
14 Address “Gross Gains” Caused by the Specific Charged Offenses

15 The Court is considering whether the gains-based Alternative Fines Act sentencing
16 allegations should be dismissed because they will unduly complicate the trial. Dkt. 201 at 5-6.
17 The government will be submitting additional information about its gains case on January 11,
18 2016.² Only financial evidence that is tailored to address alleged additional before-tax profit to
19 PG&E proximately derived from the specific charged offenses should be admissible to prove
20 alleged gains. *See United States v. Sanford Ltd.*, 878 F. Supp. 2d 137, 153 (D.D.C. 2012). The
21 defendant anticipates that the government’s proffered evidence will not address the stringent
22 standards of *Sanford* and other cases.

23 7. Motion to Exclude Expert Testimony by Alan Beshore

24 In a November 9, 2015 letter, the government disclosed Alan Beshore, the current
25 Director of the Central Region, Office of Pipeline Safety, Pipeline and Hazardous Materials
26 Safety Administration (“PHMSA”), as an expert witness who would testify about, among other

27 ² PG&E also intends to request leave to file a responsive brief to the government’s January 11
28 Alternative Fines Act submission by January 18, and has requested that the government stipulate
to its request.

things, “the structure of the Pipeline Safety Act regulations, including . . . what the pipeline regulations require of operators [and] what operators must do to comply with the pipeline regulations,” and his work with other pipeline operators “to determine whether operator actions to ensure future pipeline integrity were prudent.” The government recently indicated that it does not believe that such testimony “constitutes expert testimony but [is] providing notice of his testimony in an abundance of caution.” This is clearly Rule 701 expert testimony. Moreover, expert testimony on these topics should not be permitted because it involves opinions about what the law requires of operators. Unless the government confirms that Beshore will not be testifying about such topics, PG&E seeks leave to file a motion to exclude this testimony.

8. Motion to Exclude Expert Testimony by Glen Stevick

In a November 9, 2015 letter, the government also disclosed Glen Stevick, a mechanical engineer, as an expert witness who will testify concerning “pipeline dynamics” and his opinions concerning the metallurgical cause of the San Bruno explosion. On November 25, 2015, PG&E asked the government to provide, in accordance with its Rule 16 obligations, a description of the bases for each opinion and all documents and information that Stevick relied on in preparing his opinions. The government has since identified some documents that Stevick used but stated, on January 8, that it would identify or produce the rest of such documents by January 18, 2016. The government has also said that it does not intend to disclose an expert report for Stevick. Consistent with the Court’s December 22, 2015 Order stating that PG&E “may file any motions in *limine* related to evidence the government produces after January 11, 2016 at a date to be determined,” Dkt. 213 at 2, PG&E seeks leave to file a motion to exclude Stevick’s testimony, once it has an opportunity to review the documents and information on which he relied.³

9. Motion to Exclude Expert Testimony by Howard Lubow

In a November 9, 2015 letter, the government disclosed Howard Lubow, a public utility consultant, as an expert witness who will testify about “the landscape of utility regulation, the rate-making process, and the obligations regarding maintaining safe operations that accompany

³ Just before 5:00 p.m. on the date of this filing, the government sent an email indicating it has “decided not to call him as an expert witness.” If the government confirms that Mr. Stevick will not offer any testimony in this trial, this motion may not be necessary.

1 utility operations.” The government informed PG&E on December 22, 2015 that it would not be
 2 producing an expert report by Lubow until January 18, 2016 at the earliest. On January 4, 2016,
 3 it sent another letter acknowledging that the initial letter only provided the “topics of testimony”
 4 for its experts, and stating that the January 18 report will include “his opinions and conclusion
 5 that he will offer at trial” and “the bases for those opinions and conclusions.”

6 Based on the government’s limited disclosures to date, it appears that the government
 7 intends Lubow to testify about a host of topics, such as what he thinks PG&E should have spent
 8 on operations and maintenance. Consistent with the Court’s December 22, 2015 Order stating
 9 that PG&E “may file any motions in *limine* related to evidence the government produces after
 10 January 11, 2016 at a date to be determined,” Dkt. 213 at 2, PG&E seeks leave to file a motion to
 11 exclude some or all of Lubow’s testimony before opening statements, once it has an opportunity
 12 to review his expert report.

13 10. Motion to Exclude Testimony by Margaret Felts

14 In a November 9, 2015 letter, the government disclosed Margaret Felts as a “summary
 15 witness” who would testify about the “state of record keeping at PG&E.” According to her
 16 resume, Felts is a lawyer and petroleum engineer who assists “law firms, regulatory agencies and
 17 private entities” with “behind-the-scene [sic] discovery, research and strategy development.”
 18 The government has indicated that it “do[es] not believe Ms. Felts . . . will be rendering expert
 19 opinions,” but its disclosures suggest that she will be testifying about her view of what records
 20 should be maintained and how one does that. Ms. Felts previously testified as an expert in
 21 CPUC proceedings. PG&E seeks leave to file a motion to exclude of her testimony as improper
 22 expert testimony and as irrelevant.

23 11. Motion to Exclude All Evidence and Argument Relating to Allegations About
 24 Lines Not Alleged in the Indictment or Segments Not Included in the Bill of
 25 Particulars

26 The government has proposed to introduce evidence of (1) planned and unplanned
 27 pressure increases on eight uncharged pipelines and (2) data purportedly not gathered and
 28 integrated on potentially dozens of other pipelines as reflected in PG&E’s Audit Change Log for

1 its Geographic Information System, both of which it contends are “inextricably intertwined” with
2 the charged conduct.

3 Evidence and argument regarding specific covered and non-covered pipeline segments
4 not identified in the government’s Bill of Particulars should also be excluded. The five charged
5 subsections of integrity management regulations impose duties on a covered segment-by-covered
6 segment basis. Dkt. 228 at 4-5. Evidence that does not have a specific connection to an
7 identified covered segment is irrelevant, as the government must prove a knowing and willful
8 failure to undertake duties with respect to the specific identified covered segments. Evidence
9 and argument relating to uncharged lines and unidentified pipeline segments is also inadmissible
10 under Rule 403 because it will unfairly prejudice PG&E, confuse the issues, mislead the jury,
11 and waste time by requiring various mini-trials on uncharged pipelines.

12 12. Motion to Exclude All Evidence and Argument Alleging That a Pressure Reading
13 Less Than the Maximum Operating Pressure of a Covered Segment in the
14 Relevant Five Years Is a Violation

15 We anticipate that the terms “Maximum Allowable Operating Pressure” (“MAOP”) and
16 “Maximum Operating Pressure” (“MOP”) will be used in various contexts throughout the
17 trial. Because these similar but distinct terms are pivotal to understanding the regulations, there
18 is a high possibility of juror confusion if conflicting evidence regarding their meaning is
19 introduced. This motion would limit evidence of exceedances of MAOP as irrelevant when the
20 charged regulation only concerns exceedances of the MOP during the five years preceding HCA
21 identification.

22 13. Motion to Exclude All Evidence and Argument Relating to the Rule 404(b)
23 Topics Withdrawn by the Government

24 The Court’s June 29, 2015 Order regarding PG&E’s discovery motions required the
25 government to provide PG&E with notice of the topics it planned to introduce under Rule 404(b)
26 by no later than September 18, 2015. Dkt. 103 at 25-27. On September 18, 2015, the
27 government disclosed 22 broad categories of evidence of other alleged wrongful conduct under
28 Rule 404(b), with an additional untimely category proposed on September 21, 2015. After the

1 defense repeatedly requested clarity and discovery into the proposed topics, the government
 2 withdrew fourteen of the categories of proposed Rule 404(b) topics. In an attempt to avoid the
 3 waste of resources and the Court's time, we requested multiple times that the government agree
 4 that it would not attempt to offer evidence or argument relating to the Rule 404(b) topics
 5 withdrawn by the government, but the government has not responded to this request.

6 14. Motion to Exclude All Evidence and Argument Relating to Distribution Lines

7 As explained above, on September 18, 2005, the government disclosed 22 different
 8 proposed Rule 404(b) categories. Of those, seven related to events that occurred on PG&E's gas
 9 distribution system. Then, last month—perhaps recognizing that PG&E's 40,000-odd mile
 10 distribution system is governed by different (but equally complex) regulations than those charged
 11 about PG&E's transmission system—the government withdrew all seven distribution-related
 12 topics. All of the pipeline regulations at issue in the superseding indictment concern PG&E's
 13 gas transmission pipeline system—made up of large diameter, highly-pressurized steel pipe
 14 transporting natural gas from gathering lines/storage facilities to various distribution centers. In
 15 contrast, PG&E's gas distribution pipeline system is made up of many more miles of smaller
 16 pipe, often plastic and less than two inches in diameter, operating at much lower pressures and
 17 carrying gas to individual customers. Unless the government confirms it will not offer any
 18 evidence concerning distribution rules and PG&E's distribution system, the defense will seek to
 19 file a motion *in limine*.

20 15. Motion to Exclude All Evidence and Argument Regarding Data Not Required to
 21 be Gathered and Integrated for the Charged Covered Segments

22 The government charged PG&E under 49 C.F.R. § 192.917(b), which requires operators
 23 to “gather and integrate *existing* data and information.” (emphasis added). The defense proposes
 24 a motion to exclude evidence concerning data that did not exist within the charged period of time
 25 or data on lines not charged in the indictment.

16. Motion to Exclude All Evidence and Argument Relating to PG&E's Gas Pipeline Replacement Program

The government has disclosed that it will seek to introduce evidence that in 2000 "PG&E transferred its Gas Pipeline Replacement Program (GPRP)," which was implemented in the mid-1980s, "into the Risk Management Program (RMP)." The government contends that this evidence is "inextricably intertwined with the charged conduct" because it will show that PG&E "cut costs" through the change and that "had GPRP been continued, miles of transmission pipeline would have been replaced or hydrotested, including L-132." This GPRP evidence should be excluded as irrelevant, unfairly prejudicial, confusing, and a waste of time. Segment 180 of Line 132 did not meet the criteria for replacement under the GPRP, so the program change does not support the irrelevant premise for which the government would offer it. Moreover, the integrity management regulations ultimately enacted in 2004 required operators to create integrity management programs, a form of risk management, so there can be no connection between PG&E's pre-enactment move to such a program and the charged regulatory offenses.

17. Motion to Require a Proffer of Scienter Evidence

The conduct charged in the superseding indictment dates back decades and potentially involves dozens of the defendant's employees, former employees and contractors. Yet the indictment does not identify a single person who did something wrong or a discrete act a person took that was improper. In order to prove a criminal violation of the charged regulations, the government will have to identify a person or persons with the requisite intent (knowing and willful) who committed a wrongful act within the relevant time period. It is not enough to aggregate what might be, at most, negligent conduct by a variety of employees over time. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964) ("The mere presence of stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.").

Under *United States v. Vega*, 188 F.3d 1150, 1153 (9th Cir. 1999), and Rule 404(b), the Court should exclude all evidence and argument related to the government’s late-disclosed 23rd category for failure to provide reasonable notice in a timely manner. Should the Court decide to excuse the government’s late disclosure and allow the government to proceed as though its disclosure was timely, PG&E respectfully requests the opportunity to move *in limine*, substantively, to exclude this evidence pursuant to Rules 401, 402, 403 and 404(b).

For the foregoing reasons, PG&E respectfully requests that the Court allow it to file the motions described above.

Respectfully submitted,

Kate Dyer
CLARENCE, DYER & COHEN LLP

DEF.'S BRIEF REGARDING ADDITIONAL
MOTS. IN LIMINE
Case No. CR-14-00175-TEH